
U.S. Department of Labor
Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

ARB CASE NO. 97-031
ALJ CASE NO. 96-ERA-13
DATE: November 25, 1997

In the Matter of:

THOMAS ABRAHAM,
COMPLAINANT,

v.

LAWNWOOD REGIONAL
MEDICAL CENTER,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

The Administrative Law Judge (ALJ) submitted a Recommended Decision and Order (R. D. and O.) in this case under the Energy Reorganization Act (ERA), as amended, 42 U.S.C. § 5851(a) (1994), recommending that the complaint be dismissed. The record in this case has been thoroughly reviewed. We find that it fully supports the ALJ's findings and conclusions that Complainant Thomas Abraham (Abraham) was not fired for engaging in ERA protected activities, but for his behavior towards another employee, R. D. and O. at 7. *Boschuk v. J. & L. Testing, Inc.*, ARB Case No.

97-020, ALJ Case No. 96-ERA-16, ARB Fin. Dec. and Ord., Sept. 23, 1997, slip op. at 1-2; *Nickerson v. Corrpro Companies, Inc.*, ARB Case No. 97-030, ALJ Case No. 96-TSC-9, ARB Fin. Dec. and Ord., Jun. 30, 1997, slip op. at 1-2; *Remusat v. Bartlett Nuclear, Inc.*, Case No. 94-ERA-36, Sec. Fin. Dec. and Ord., Feb. 26, 1996, slip op. at 2; *Stockdill*

v. Catalytic Industrial Maintenance Co., Inc., Case No. 90-ERA-43, Sec. Fin. Dec. and Ord., Jan. 24, 1996, slip op. at 2.

BACKGROUND

Abraham was employed by Respondent Lawnwood Regional Medical Center (Lawnwood), Fort Pierce, Florida, as a nuclear medicine technologist from February 1995, to his termination on August 15, 1995,[1] after a heated altercation on August 9, 1995 with Rhoda Hammer (Hammer), Assistant Director of Cardiology. Pursuant to a request to Hammer from Dr. Abdul Shadani (Shadani), Hammer and her supervisor, Stephen Burgin (Burgin),[2] Director of Cardiology, went to Abraham's unit to determine why Shadani[3] had not been routinely notified that a test Abraham performed the previous day had failed (requiring its repetition) and to develop procedures to avoid the problem in the future. T. 286.

The ALJ described Abraham's interaction with Hammer as follows:

> . . . After an exchange of words with [Abraham], during which time [he] was apparently simultaneously trying to eat his lunch and attend to the busy flow of patients, Ms. Hammer perceived what she considered to be a developing and potential breach of confidentiality by certain statements being made by [Abraham regarding the patient whose test had failed] in the presence of a patient. She attempted to alert [Abraham] to this potential when [he], apparently in a raised voice and with arm gestures and finger pointing of exasperation toward Ms. Hammer, expressed his displeasure with what he considered to be an untimely visit interrupting his busy schedule of administering tests to patients. In no uncertain terms, [Abraham] eventually told Ms. Hammer to leave. Mr. Burgin confirms . . . this rendition of what transpired, as does another eyewitness, Ms. [Melody] Henry, the receptionist at [Abraham's] work situs. Indeed, [Abraham] confirms his state of utter frustration at the time of the incident.
>
> . . . I must credit Ms. Hammer's *perception* of fear and physical threat by [Abraham's] conduct during the . . . incident. There is no evidence in this record to support the proposition the Ms. Hammer created or otherwise fabricated *her perception*. Moreover, there is some evidence buttressing her acute reaction to [Abraham's] behavior.

R. D. and O. at 6-7 (record citations omitted) (emphasis in original).

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In holding that Abraham's discharge was predicated on his behavior towards Hammer, rather than on any protected activities, R. D. and O. at 7, the ALJ suggested that Hammer provoked Abraham's actions by her intrusive behavior:

> There is ample evidence of hectic, stressful work conditions. Ms. Hammer's choice of ([Abraham's] hectic work station) location in which to discuss Dr. Shadani's problem may indeed be viewed as altogether inappropriate. Also well-

> taken, is [Abraham's] utter frustration at Ms. Hammer's attempt to silence him, in the middle of his response, after she first engaged him in the "brainstorming" of the pending matter.

R. D. and O. at 7, n.12 (record citation omitted) (parentheses in original). We agree that Hammer's persistence was inappropriate, particularly since it was apparent that Abraham was working alone, without the participation of Michael Bruggink, chief nuclear medicine technologist, who was home that day. *See* T. 58-59; 290-305; Hammer deposition, CX 18 at 45-53, 64-69; Burgin deposition, CX 19 at 13.

Abraham engaged in various ERA protected activities. R. D. and O. at 5. He wrote comments on his April probationary job performance appraisal from Robert Stouffer (Stouffer), Director of Radiology and his immediate supervisor, T. 70-76, 398, 402, stating that he "prefer[ed] to give my polite comments, and suggestions, on a nuclear medicine quality improvement subcommittee which may be formed with my presence therein," CX 2. During the actual evaluation, Stouffer discussed Abraham's concern about the quality management program in their department, and encouraged him to "work with the process in the department and all the things we wanted to do in there . . . . [regarding] quality improvement, quality management in nuclear medicine." T. 401-02, 425-26. In July, he sent a memorandum to the house supervisor, the security and maintenance departments, and transporting personnel, complaining of "the inconvenience caused to some of the important nuclear medicine procedures/projections since 7/21/95" by the absence of a missing nuclear medicine imaging cart and requesting its return or an "equally good stretcher." CX 13. He raised unspecified concerns with Drs. Stern and Marshall. T. 359-60. He complained to Burgin and Jay Finnegan, Assistant Chief Operations Officer, about delays caused by doctors and transporters. T. 359, 365. He complained to Stouffer about the need for additional help when Michael Bruggink went on vacation. T. 367. On August 11, upon being informed by Marjorie Bruggink of his suspension by David Riley (Riley), Assistant Vice President for Human Resources,[4] and asked to leave the

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premises, he told her "to make sure that I told Mr. Stouffer and Mr. Riley that you . . . were not finished . . . . That you would call HRS [Florida Department of Health and Rehabilitative Services]." T. 188-89. As he left the hospital after complaining of the suspension's unfairness to Dr. Beaton, the radiation safety officer, he informed him of a recent infiltration and a radiation spill. T. 185, 341-43. Finally, on August 11, he telephoned his complaint to Florida HRS.[5]

DISCUSSION

Abraham argues on appeal that he should not have been discharged for the Hammer incident because his behavior towards Hammer was itself a protected activity. Abraham states that:

> Complainant's position that he was terminated on August 15, 1995, in retaliation for his protected activities including his right to refuse, and internally object to unauthorized supervision (CX 10) [Abraham's August 10 memorandum to Stouffer explaining the incident] need further review.
>
> The knowledge of protected activity, and the CX 10 contributed to the discharge. He was terminated 24 hours before the State of Florida inspection [which he had initiated upon his suspension] because of manager's [sic] apprehensions that the complainant would prove his legal perceptions' in the inspection that Rhoda Hammer's altogether inappropriate' behavior (ALJ footnote #12) on August 9, 1995 had the potentiality for non-compliance, contrary to state rules and strict prescriptions' of law. This type of non-compliance was in CX 7 & 8, citations from the State of Florida.

Abraham's initial brief to the Board at 4; rebuttal brief at 2, 5.

Assuming, *arguendo*, that his confrontation with Hammer was a protected internal complaint because her actions might have affected quality or safety matters, Lawnwood was still free to discharge him for his misbehavior towards her. An employee's insubordination towards supervisors and coworkers, even when engaged in protected activity, may be justification for termination. *Kahn v. U.S. Secretary of Labor*, 64 F.3d 271, 279 (7th Cir. 1995); *Skelley v, Consolidated Freightways Corp.*, Case No. 95-SWD-001, ARB Fin. Dec. and Ord. of Dism., July 25, 1996, slip

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op. at 5, n.6; and cases cited. An otherwise protected employee is not automatically absolved from abusing his or her status and overstepping the bounds of conduct when provoked. *Dunham v. Brock*, 794 F.2d 1037, 1041 (5th Cir. 1986); *Garn v. Toledo Edison Co.*, Case No. 88-ERA-21, Sec. Fin. Dec. and Ord., May 18, 1995, slip op. at 6. Thus, although Hammer's choice of Abraham's work station for her inquiry and discussion was inappropriate, we find that Abraham's excessive response was subject to adverse action by Lawnwood.

Abraham also argues that Lawnwood's decision to discharge him was improper because of Hammer's inappropriate choice of his work station for her actions, her alleged fabrications of the incident, and Lawnwood's faulty investigation of her charges. Abraham's initial brief to the Board at 1-3, 5; rebuttal brief at 1-2, 4-5. Resolution of these matters in Abraham's favor would not establish by a preponderance of the evidence that he was discharged for protected activities. Rather, it would merely establish that his discharge was unreasonable or flawed as a matter of sound management practice.[6]

As the ALJ explained, our jurisdiction is limited to determining whether Abraham's discharge was based on his protected activities, not whether his discharge was unreasonable or erroneous for other reasons:

> Finally, it needs to be emphasized that while there may exist in this record some evidence that Ms. Hammer over-reacted to or misperceived [Abraham's] behavior on August 9, 1995, and thus that [Lawnwood] fired [him] unreasonably, there is *no* evidence that [Lawnwood] fired [him] for "blowing the whistle," the only reason actionable under the Act. Even if I were to conclude that [Lawnwood] made the wrong decision to terminate a good employee, besieged by too busy a work schedule, and altogether dedicated to performing in the best interests of the patients brought to him, or even if I were to fully believe that [his] behavior on August 9, 199[5] was not threatening in the objective sense and/or that he did not intend to threaten, the Act does not provide any relief for this type of finding. The Act is simply not concerned with, nor am I authorized to conduct, a review of management's decision to fire an employee *unless* the termination is shown to have been occasioned by the employee's reporting of safety hazards, etc.

R. D. and O. at 7-8 (footnotes omitted) (emphasis in original).

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Similarly, the court of appeals in *Kahn* stated:

> Our role as a court of review is clear. "We do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how medieval a firm's practices, no matter how highhanded its decisional process, no matter how mistaken the firm's managers, [the Energy Reorganization Act] does not interfere." *McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 373 (7th Cir. 1992) (citations omitted).

Kahn v. U.S. Secretary of Labor, 64 F.3d at 280-81 (brackets in original).

Finally, we disagree with Abraham that this is a dual motive case. Abraham's initial brief to the Board at 4; rebuttal brief at 4. In dual motive cases under the ERA, a complainant must demonstrate by a preponderance of the evidence that the respondent took adverse action, at least in part, because he engaged in protected activity. If the complainant successfully proves illegal motive, the burden shifts to the respondent to demonstrate "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior," 42 U.S.C. § 5851(b)(3)(D). *Talbert v. Washington Public Power Supply System*, ARB Case No. 96-023, ALJ Case No. 93-ERA-35, ARB Fin. Dec. and Ord., Sept. 27, 1996, slip op. at 4; *Yule v. Burns International Security Service*, Case No. 93-ERA-12 Sec. Dec. and Ord., May 24, 1995, slip op. at 7-8.

Abraham has not proved by a preponderance of the evidence that his termination was partially motivated by protected activities. R. D. and O. at 7.[7] Riley terminated Abraham on August 10, subject to reversal by Stouffer upon his return.[8] Riley's action was based on Hammer's incident report, RX 1, which makes no reference to Abraham's protected activities, and Riley's conversation with Marjorie Bruggink, who learned of the incident from Hammer and Burgin directly and suggested that an incident report be submitted. T. 143-46, 173, 179-80, 450-55. Indeed, Riley had never even heard of Abraham until he

ordered his conditional termination. T. 468-69. Thus, there is no evidence suggesting that Riley's action was motivated in any part by Abraham's protected activities prior to the Hammer incident, since Riley did not know of Abraham or his protected activities.

Upon his return, Stouffer ratified Riley's initial decision[9] after reviewing Hammer's

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incident report and discussing the matter with Marjorie Bruggink, Hammer, Burgin and Abraham himself. T. 376-79, 383, 414, 431-33. Stouffer accepted the perceptions of Hammer and Burgin over Abraham in making the final decision to terminate him. T. 440-41. Abraham has not demonstrated by a preponderance of the evidence that Stouffer's decision was based in any part on Abraham's protected activities.[10]

ORDER

For the foregoing reasons, the complaint is **DISMISSED**.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

[ENDNOTES]

[1] The R. D. and O. at 5 and 8 incorrectly states Abraham's termination date as August 15, 1996, rather than 1995.

[2] Burgin did not testify at the hearing. By that time, he was no longer employed by Lawnwood, having lost his job due to reorganization of departments. Burgin deposition, CX 19 at 8. His deposition is consistent with Hammer's testimony, T. 266-333, regarding the August 9 incident.

[3] Although Shadani's request precipitated the events leading to Abrahams's discharge, one of the vagaries of this case is Shadani's inability at the hearing to recall the failed test or his request that Hammer pursue his lack of notification thereof. T. 162, 169.

[4] Riley, rather than Stouffer, suspended Abraham because Stouffer was absent and Riley believed immediate action was warranted. T. 451-52.

[5] Abraham's complaint to HRS resulted in an investigation by its Office of Radiation Control, which determined that three of his twenty-one allegations were either partially or fully substantiated. CX 4, CX 9, T. 437-38.

[6] Abraham's discharge was viewed as a matter of management discretion and prerogative by the Florida Unemployment Compensation Appeals Bureau in awarding him unemployment compensation benefits.

> . . . The law provides that a claimant who has been discharged for misconduct connected with the work shall be disqualified from receiving benefits. "Misconduct connected with work" means a willful or wanton act or course of conduct in violation of the worker's duties and obligations to the employer. The evidence in this case shows that the claimant was discharged following an incident which occurred approximately August 8, through 10, 1995. In cases of misconduct, it is incumbent upon the employer to show by a preponderance of the evidence that the claimant has committed an act or engaged in a course of conduct meeting the above definition. That burden has not been met. While it is evident that there was a problem between the claimant and managers of another department, the evidence presented is not sufficient to establish that the claimant acted in a manner that was so inappropriate or egregious as to conclude misconduct. *While the claimant might have been more calm in dealing with the individuals, the fact of the matter is he was involved with a patient at the time this incident was being discussed with him. Testimony was presented that the claimant is normally a serious individual and it is apparent he resented the interruption during the workday. While the employer may have made a sound business decision in terminating an employee with whom they were dissatisfied, they have simply not shown misconduct on his part*.

Notice of Decision of Appeals Referee, Feb. 27, 1996, CX 24 at 2 (emphasis added).

[7] Abraham's reliance on *Consolidated Edison Co. of New York v. Secretary of Labor*, 673 F.2d 61 (2nd Cir. 1982), is misplaced. Unlike the instant case, the complainant here was able to demonstrate that his protected activities played a role in his discharge and a coworker supported his denial of threatening another employee. *Consolidated Edison*, 673 F.2d at 63.

[8] According to Riley, the decisional process was as follows:

> [Abraham] needed to be terminated immediately . . . . I chose to have Marjorie [Bruggink] go and tell him to go on home and Mr. Stouffer would terminate him on Monday. But that he was terminated . . . . That Thomas was through and he would not be returning . . . . [Stouffer's role was] to inform Mr. Abraham that he was terminated and to find out if there was some wild explanation as to why he shouldn't be -- like he wasn't there that day. I mean something substantial.

T. 454-56.

[9] Stouffer referred to Riley's action as a suspension. "In my mind, you [sic] being suspended is being suspended until my return. It's a termination. Maybe it's semantics, but in my mind, it's -- you were suspended from employment . . ." T. 382. He believed that he had the authority to overturn Riley's action. T. 432, 434, 443.

[10] The only time Stouffer could recall discussing quality matters with Abraham was during his probationary evaluation that spring. T. 398, 401-02, 425-26, 436. However, Stouffer was aware upon his return that Abraham had threatened to file a complaint with the Florida HRS after his suspension by Riley. T. 393. At his meeting with Stouffer, Abraham informed him that he had called HRS, but Stouffer could not recall whether Abraham had related that information before or after being informed of his termination. T. 396-97. In any event, the record is clear that Abraham was terminated for the Hammer incident, not for his subsequent action informing HRS of alleged problems in his unit.